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Suhani bt Mat Daud v Public Prosecutor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NOS 42–15 OF 2010 AND 42–16 OF 2010
MOHD AMIN FIRDAUS JC
24 MAY 2011

Criminal Law — Penal Code — s 409 — Criminal breach of trust — Ingredients of offence — Whether ingredients proven by prosecution — Misappropriation of clients' monies by advocate and solicitor — Whether appellant dishonestly misappropriated and/or converted money to her own use — Whether fact that accused intended to make restitution of monies constituted defence

Criminal Procedure — Sentencing — Criminal breach of trust — Appeal, against — Misappropriation of clients' monies by advocate and solicitor — Custodial sentence increased from two years to six years due to aggravating factors — Deterrence principle

On 27 July 2000, PW1 and a group of purchasers entered into a sales and purchase agreement with the vendor to buy two lots of land. A deposit of RM30,108.02 was paid to the vendor and the balance purchase price of RM270,972.16 was to be settled within six months. Four cheques each amounting to RM25,000 were given to the legal firm of Suhani & Partners of which the appellant/accused was a partner. Another cheque for RM170,972.16 was also given to the firm. The balance purchase price of RM270,972.16 was never handed over to the vendor and PW1 lodged a police report on 7 July 2001. The legal firm of Suhani & Partners was subsequently dissolved on 12 March 2003. The clients' account of the firm as at 9 July 2003 had a balance of RM1,612.75. PW1 complained about the matter to the Advocates and Solicitors Disciplinary Board and the appellant was struck off the Roll of Advocates and Solicitors on 4 May 2005. Meanwhile, a civil suit was filed by PW1 against the appellant and the latter was ordered to pay back the said sum of RM270,972.16 to PW1. However, the appellant failed to comply with the court order. The appellant was subsequently arrested by the police and thereafter she paid back a sum of RM280,000 by seven instalments. Nevertheless, the appellant was charged in court for the offence of criminal breach of trust under s 409 of the Penal Code ('Code'). The appellant did not deny taking the sum of RM270,972.16 but contended that there was no dishonest intention in doing so. The appellant claimed that she had used the money to settle the conveyancing files of another legal firm that she had taken over. The appellant also claimed that she was then confident that she would be getting some money from a court proceeding relating to the other legal firm.

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However, the court in that proceeding had decided against her. The issue which therefore arose was whether by using the monies to settle the payments in connection with the conveyancing files taken over from the other legal firm, did the appellant dishonestly misappropriated and/or converted that money to her own use thereby committing criminal breach of trust. The sessions court found the appellant guilty and convicted her of the offence and sentenced her to two year imprisonment. Hence this appeal.

Held, dismissing the appeal:

(1) 'Property' refers to moveable and immoveable property and it is settled law that the former includes money (see para 70).

(2) The appellant had committed an act of dishonesty as her explanation on why she had used up the money was not reasonable, when taking into consideration the facts and surrounding circumstances of the case (see para 83).

(3) If the essential elements of the offence of criminal breach of trust have been made out, the fact that at the time of the offence, the accused had intended to make restitution as soon as possible, cannot in law constitute a defence because even temporary misappropriation or conversion of money, or dishonest use or disposal of it in violation of any direction of law or of any legal contract express or implied or wilfully suffering any other person so to do, would amount to criminal breach of trust within the meaning of s 405 of the Code (see para 88).

(4) The prosecution had proved its case beyond reasonable doubt against the appellant in that she had dishonestly misappropriated and/or converted the sum of RM270,972.16 to her own use. The ingredients of the offence had been proven and thus the presumption under s 409B of the Code applied (see para 138).

(5) The court enhanced the custodial sentence from two years to six years on the appellant due to the aggravating factors in this case. The appellant had betrayed the trust placed in her as an advocate and solicitor. For almost seven years or more she had not even sought to make amends with PW1 for dishonestly misappropriated and/or converted the amount of money in question to her own use until she was about to be arrested by the police and charged in court. The sum of RM270,972.16 was a large amount in 2001 and she had wrongly deprived PW1 and all the other purchasers of the opportunity to own the plots of land that they had wanted. All of them hailed from the working class, and being unable to get the property that they had wished to own probably had caused them a lot of frustration and pain. Hence the increased custodial sentence

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imposed not only fulfilled public interest but it also will act as deterrence to others in the same profession who may be inclined to commit such offence (see paras 163–164).

[Bahasa Malaysia summary

Pada 27 Julai 2000, SP1 dan sekumpulan pembeli memeterai perjanjian jual beli dengan penjual untuk membeli dua lot hartanah. Deposit RM30,108.02 dibayar kepada penjual dan baki bayaran belian sebanyak RM270,972.16 akan diselesaikan dalam masa enam bulan. Empat cek berjumlah RM25,000 diberikan kepada firma guaman Suhani & Partners di mana perayu/tertuduh merupakan rakan kongsi. Sekeping cek berjumlah RM170,972.16 juga turut diberikan kepada firma tersebut. Baki harga belian RM270,972.16 tidak pernah diserahkan kepada penjual dan SP1 membuat laporan polis pada 7 Julai 2001. Seterusnya, firma guaman Suhani & Partners dibubarkan pada 12 Mac 2003. Akaun klien firma tersebut pada 9 Julai 2003 mempunyai baki sebanyak RM1,612.75. SP1 mengadukan perkara tersebut kepada Badan Disiplin Peguamcara dan Peguambela dan perayu dibuang daripada Badan Peguambela dan Peguamcara pada 4 Mei 2005. Sementara itu, satu guaman sivil difailkan oleh SP1 terhadap perayu dan perayu diarahkan untuk membayar semula sejumlah RM270,972.16 kepada SP1. Walau bagaimanapun, perayu gagal untuk mematuhi perintah mahkamah. Perayu seterusnya ditahan oleh pihak polis dan beliau kemudiannya membayar sejumlah RM280,000 dengan tujuh kali ansuran. Namun begitu, perayu dituduh di mahkamah atas kesalahan jenayah pecah amanah di bawah s 409 Kanun Keseksaan ('Kanun'). Perayu tidak menafikan mengambil sejumlah RM270,972.16 tetapi menghujah bahawa tidak terdapat niat tidak jujur ketika berbuat demikian. Perayu mendakwa bahawa beliau menggunakan wang tersebut bagi menyelesaikan fail-fail penyampaian firma guaman yang diambil alih oleh beliau. Perayu juga mendakwa bahawa beliau yakin beliau akan mendapat wang daripada prosiding mahkamah berkaitan dengan firma guaman yang lagi satu. Walau bagaimanapun, mahkamah di dalam prosiding tersebut memutuskan sebaliknya terhadap beliau. Oleh itu isu yang timbul adalah sama ada dengan menggunakan wang bagi menyelesaikan bayaran berhubung fail-fail penyampaian yang diambil alih oleh firma lain, adakah perayu secara tidak jujur menyalahgunakan dan/atau menukar wang tersebut untuk kegunaannya dan oleh itu melakukan jenayah pecah amanah? Mahkamah sesyen mendapati perayu bersalah, menyabitkannya dengan kesalahan tersebut dan menjatuhkan hukuman penjara dua tahun ke atas beliau. Oleh itu rayuan ini dibuat.

Diputuskan, menolak rayuan:

(1) 'Hartanah' merujuk kepada harta yang boleh dialih dan tidak boleh dialih dan undang-undang menetapkan bahawa harta boleh dialih termasuklah wang (lihat perenggan 70).

(2) Perayu telah melakukan tindakan tidak jujur memandangkan penjelasan

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beliau mengenai bagaimana beliau menggunakan wang tersebut adalah tidak munasabah, dengan mengambilkira fakta-fakta dan keadaan sekeliling kes (lihat perenggan 83).

(3) Sekiranya elemen-elemen penting jenayah pecah amanah didapati, fakta bahawa pada masa kesalahan tersebut tertuduh berniat membuat pembayaran semula secepat mungkin, bukanlah satu pembelaan di sisi undang-undang kerana meskipun penyalahgunaan atau penukaran wang dibuat sementara atau penyelewengan atau penggunaannya menyalahi peraturan undang-undang atau mana-mana perjanjian undang-undang tersurat atau tersirat atau 'wilfully suffering any other person so to do', ianya tetap merupakan jenayah pecah amanah menurut maksud s 405 Kanun (lihat perenggan 88).

(4) Pihak pendakwaan telah membuktikan kes tersebut melampaui keraguan munasabah terhadap perayu bahawa beliau secara seleweng menyalahgunakan dan/atau menukar wang sebanyak RM270,972.16 bagi kegunaannya sendiri. Kandungan-kandungan kesalahan telah dibuktikan dan oleh itu anggapan di bawah s 409B Kanun digunapakai (lihat perenggan 138).

(5) Mahkamah menambah hukuman penjara dari dua tahun kepada enam tahun ke atas perayu disebabkan faktor pemberatan di dalam kes ini. Perayu telah mengkhianati amanah yang diletakkan kepada beliau sebagai peguambela dan peguamcara. Selama hampir tujuh tahun atau lebih, beliau tidak cuba berbaik dengan SP1 yang secara seleweng menyalahgunakan dan/atau menukar wang yang dipersoalkan bagi kegunaan beliau sendiri sehinggalah beliau ditangkap polis dan dituduh di mahkamah. Sejumlah RM270,972.16 merupakan jumlah yang besar pada tahun 2001 dan beliau telah menyebabkan SP1 dan beberapa pembeli lain tidak berpeluang memiliki plot-plot tanah yang diingini. Rata-rata pembeli adalah daripada kelas orang bekerja, dan kegagalan memiliki hartanah yang diimpikan semestinya mengakibatkan kekecewaan dan kesusahan. Oleh itu hukuman penjara yang ditambah bukan sahaja dikenakan bagi memenuhi kepentingan awam tetapi juga bertindak sebagai penghalang kepada sesiapa yang berada di dalam kerjaya sama yang mungkin terpengaruh untuk melakukan kesalahan sedemikian (lihat perenggan 163–164).]

Notes

For cases on criminal breach of trust, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 34517–4518.

For cases on s 409 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1999–2026.

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Legislation referred to

Courts of Judicature Act 1964 s 66 (1)
Criminal Procedure Code ss 51A(1)(c), 173(l)(i), 180(1), (2), (3), (4), 425
Evidence Act 1950 ss 9, 114(g), 138(4)
Penal Code ss 24, 405, 408, 409, 409B
Penal Code [SG] s 24

Jagjit Singh (Jagjit Singh & Co), Akberdin bin Hj Abdul Kader (Akberdin & Co) for the appellant.
Devanandan a/l Subramaniam (Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Amin Firdaus JC:

BACKGROUND FACTS

[1] The salient facts of the case are that the prosecution star witness named Wan Mansor bin Wan Muhamad ('PW1) an Associate Professor at Universiti Kuala Lumpur and eleven of his friends, all members of the Koperasi Muslimin Malaysia Bhd agreed to buy two lots of land belonging to one Hj Mohd Noor bin Said @ Mohd SA Filfilan located at Seberang Perai Tengah in Penang.

[2] On 27 July 2000, PW1 entered into a sales and purchase agreement with the vendor for himself and on behalf of his friends. The due date for completion was on 25 January 2001. A deposit sum of RM30,108.02 had been paid to the vendor and a failure to complete the agreement would lead to the forfeiture of the sum deposited. The balance of the purchase price totaling RM270,972.16 should be settled within six months from the date of the agreement and a further two month grace period would be extended after the expiry of the six month deadline.

[3] Four cheques each amounted to a sum of RM25,000 and all dated 24 March 2001 were given to the legal firm of Suhani & Partners of which the appellant/accused was a partner. Another cheque dated 27 March 2001 for the amount of RM170,972.16 was also given to the firm.

[4] By a letter dated 6 July 2001 addressed to PW1, the firm of the appellant informed him that 'pihak kami akan menjelaskan wang berjumlah sebanyak RM270,972.16 sahaja secepat mungkin setelah di tolak Kos & Perbelanjaan yang melibatkan firma guaman 'Suhani & Partners' '.

[5] In consequence of finding out that the balance purchase price amounting to RM270,972.16 was never handed over to the vendor, PW1 lodged Bukit Mertajam Police Report No 3899/01 on 7 July 2001.

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[6] The legal firm of Suhani & Partners was subsequently dissolved on 12 March 2003. The shutdown of the firm and the closing of its clients' account on 9 July 2003 depicted a balance of RM1,612.75 in the account.

[7] When the said sum was still not returned to PW1, on 6 December 2001, he made a complaint about the matter to the Director of Complainant Secretariat of Advocates and Solicitors Disciplinary Board. The appellant was later struck off the roll of advocates and solicitors on 4 May 2005.

[8] Meanwhile, a civil suit was filed by PW1 against the appellant by PW1 and by an order of the Penang High Court dated 28 March 2002, the latter was ordered to pay back the said sum of RM270,972.16 to PW1. Despite the court order, the appellant did not comply with it.

[9] In early 2008, discussion took place between PW1, his fellow purchasers and the appellant on a settlement regarding the sum of money in question owed by the appellant to them.

[10] The appellant was subsequently arrested by the police on 13 March 2008 and according to the investigating officer for commercial crimes one Chief Inspector Gannason a/l Andi ('PW9'), the first directive to charge the appellant was issued on 18 March 2008. She was then supposed to be charged in court on 22 March 2008 but it did not materialise as the appellant herself had forwarded a representation to the attorney general's chambers.

[11] By a letter dated 18 March 2008, PW1 wrote to the attorney general's chambers wishing to withdraw his police report made against the appellant on the ground that she had undertaken to make restitution to PW1 by paying back the amount of RM270,972.16 in five installments.

[12] Beginning from 30 March 2008 until 17 November 2008, the appellant finally paid back a sum of RM280,000 by seven installments.

[13] Nevertheless, the whole episode eventually culminated in the appellant being charged in court on 28 July 2008 for the offence of criminal breach of trust under s 409 of the Penal Code.

[14] On 5 March 2010 after a full trial, the Butterworth Sessions Court found the appellant/accused guilty and convicted her of the offence. She was sentenced to two year imprisonment to be enforced from the date of the sentencing. Nonetheless, the sessions court granted the application by the

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appellant/accused for a stay of the execution.

DEFENCE

[15] At the outset, it is pertinent to point out that during the hearing of the appeal, learned counsel did not deny that the appellant had taken the sum of RM270,972.16 but only contended that there was no dishonest intention in doing so.

[16] Anyway, the appellant herself had admitted using up the money. Before Suhani & Partners came into existence, the appellant was a partner in the firm of Messrs Ariffin & Co and when the partner Hj Ariffin Daud passed away on 2 July 1998, the appellant continued to run the firm as a sole proprietor.

[17] On 12 October 1998, one Parizal bin Jamaludin joined her as a partner and on 25 January 2000, the name of the firm was changed to Suhani and Partners.

[18] The appellant explained that she felt a sense of responsibility for those files in the former firm of Messrs Ariffin & Co and as all its accounts were then frozen by the Bar Council, she viewed that it was easier for her to handle the files from the former firm under her own name Suhani & Partners.

[19] The appellant admitted that the sum of RM270,972.16 which was deposited into the clients' account was used up by her to settle the hundreds of conveyancing files opened by Hj Ariffin before he died. They were for stamp duties, progress payments to the developers, penalty payments and registration fees.

[20] Moreover, the appellant was then confident that the outcome of a civil suit filed by the children of the late Hj Ariffin in the Kuala Lumpur High Court against her concerning the assets and the money in the accounts of Messrs Ariffin & Co would favour her and she would soon be getting some money as a partner. This was another factor which encouraged her to use the amount of RM270,972.16 given by PW1 and his friends. Unfortunately the High Court of Kuala Lumpur decided otherwise and instead ordered the money to be paid to the beneficiaries of the deceased.

CORE ISSUE

[21] By using up the sum of RM270,972.16 in question to settle whatever monetary payments in connection with the conveyancing files taken over from Messrs Ariffin & Co, did the appellant have dishonestly misappropriated

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and/or converted that money to her own use thereby committing criminal breach of trust? A

THE PARTIES' ARGUMENTS

The appellant B

Dishonest intention

[22] The overall arguments of both learned counsel for the appellant at the appeal stage resonated with the bottom line in that there was the absence of dishonest intention on the part of the appellant when she was supposedly to have committed the offence. C

[23] It was argued that the prosecution had failed to prove the most important ingredient of the offence of criminal breach of trust which is dishonest intention. The prosecution had only proved that the appellant had 'violated the legal contract' but it did not adduce evidence to show for what purpose the money was used. There was no evidence to show that the appellant had dishonestly misappropriated the money and/or converted it for her own use. There should not have been a prima facie case as the prosecution had failed to prove the element of dishonesty. The sessions court 'did not consider the 'other purpose,' that is whether the money was converted or utilised by the appellant'. D E F

[24] The Court of Appeal case in *Periasamy s/o Sinnapan & Anor v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187 was cited to illustrate the essential element of the offence which is dishonesty. The case in *Hj Maamor bin Abdul Hj Manap v Public Prosecutor* [2002] 6 MLJ 668; [2003] 1 CLJ 370 was also cited to show that the presumption under s 409B of the Penal Code can only be activated after the prosecution has proved that the accused has misappropriated the money involved. The High Court case in *Dato Yap Peng v Public Prosecutor* [1993] 1 MLJ 337 was another case cited to support the contention that the prosecution in this instant case failed to prove that the appellant had used the money for her own use. G H

[25] *Ratantal & Dhirajlal's Law of Crimes* on p 1962 was quoted to emphasise that there must be dishonesty in the offence of criminal breach of trust. I

The appellant's intention to return the sum

[26] Another contention was that the appellant had stated in her cautioned statement ('exh D47') that the money was used up to settle the conveyancing

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files from Messrs Ariffin & Co but the learned sessions court judge had erred by saying in her judgment that the appellant had never mentioned her intention to return the money. The appellant had in fact testified in cross-examination that she would pay back the money if reference is made to p 3 in D47.

[27] Learned trial judge had not considered the detailed explanation given by the appellant in her cautioned statement ('D47') and it was not a bare denial.

[28] The appellant had explained at the earliest stage in D47 that she used the money in question to settle the conveyancing files from Messrs Ariffin & Co as all the accounts belonging to the deceased's firm were frozen.

Foreign Investment Committee

[29] The appellant in addition had explained why the balance purchase price was not released to the vendor under the sales and purchase agreement because she had still to receive approval from the foreign investment committee as the vendor is a citizen in Saudi Arabia.

Section 114(g) of the Evidence Act 1950

[30] The learned counsel further argued that the former partners from Suhaini & Partners, that is either Parijal bin Jamaludin or Saharnisha Begum binti Gulam was not subpoenaed 'to corroborate the element of dishonesty in the offence'. Hence, s 114(g) of the Evidence Act 1950 ought to be invoked against the prosecution. The Supreme Court cases in *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16; [1985] CLJ 19 and *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 were cited to support the argument.

[31] The poor investigation done has hindered the court from finding out on whether the appellant had acted with dishonesty when the former partner of the firm Saharnisha who was not called as a witness could have testified to this effect.

Non-compliance with s 51A of the Criminal Procedure Code

[32] Learned defence counsel also contended that the prosecution had failed to comply with s 51A(1)(c) of the Criminal Procedure Code in tendering exhs P13 and P14.

[33] P13 is a letter dated 28 March 2001 from the firm of Suhani & Partners to the vendor Hj Mohd Noor @ Mohamed SA Filfilah informing him that the

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firm had received the amount of RM270,972.16. P14 is a letter dated 6 July 2001 to PW1 telling him that the firm would settle the matter as soon as possible in regard to the sum of RM270,972.16 once it had deducted the costs and expenses involving the firm.

[34] Despite the defence's objection, the court admitted the two exhibits.

Recalling of witness PW1

[35] The application from the defence to recall PW1 for further cross-examination objected to by the prosecution was upheld by the court. Section 173(l)(i) and 425 of the Criminal Procedure Code including s 138(4) of the Evidence Act 1950 provided for such an application but the learned trial judge erred in law in disallowing the recalling of the witness.

Restitution

[36] The learned sessions court judge harped on the question of restitution in her grounds of judgment when it is not an ingredient of the charge unlike dishonest intention.

Testimonies of PW1 and PW3

[37] Another ground was advanced in that the testimonies of PW1 and one Saiful Azmi bin Omar (one of the buyers) have clearly showed that the appellant did not have any dishonest intention after gathering their own impressions of her arising from their discussions with her on the repayment of the sum. Both witnesses said that the appellant had displayed good intention and sincerity in wanting to pay back the sum of RM270,972.16.

Section 409B of the Penal Code

[38] The sessions court had made a mistake in invoking the presumption under s 409B of the Penal Code as there was no evidence adduced to show that the appellant had dishonestly misappropriated the money

[39] The prosecution did not ask Mohd Damanhuri bin Shamsuddin ('PW2'), the Hong Leong Bank officer to show to the court that the money withdrawn from the clients' account were made payable to whom and whether the appellant herself had pocketed the money.

[40] It was submitted that the learned sessions court judge had erred in law

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and facts and hence the appeal should be allowed.

PROSECUTION

[41] The learned deputy public prosecutor for the respondent submitted that the appellant had admitted that she had 'misappropriated' the sum of RM270,972.16 from the clients' account of Suhani & Partners and thus the only issue to be considered is whether the appellant had done it dishonestly.

[42] The testimony of PW1 as considered by the learned sessions court judge clearly shows that the appellant had dishonestly misappropriated the said sum.

[43] The letter by Dr Wan Mansor Wan Muhamad ('PW1') dated 18 March 2008 ('exh D16') to the attorney general's chambers to withdraw his complaint against the appellant 'in no way corroborates the evidence of the Appellant'. The learned trial judge had also considered this exhibit and also exh P14, the letter from Suhani & Partners dated 6 July 2001 informing PW1 that the firm would settle the amount of RM270,972.16 as soon as possible after deducting the costs and expenses 'involving' the firm.

[44] She viewed that P14 was a 'mere delay tactic' meant to hold off PW1 from taking any action against the appellant or to lull him into a false sense of security in that the money was going to be refunded in her judgment and that the appellant had no sincere intention to pay back. The cautioned statement of the appellant ('D47') had been noted by her and instead she concluded that it was detrimental to the interests of the appellant.

[45] Besides, the sessions court found that the appellant was only really interested to settle the matter after she had been arrested by the police on 13 March 2008 as a result of the police report, made against her. The fact that the appellant was only charged after seven years had already elapsed had also been taken into consideration by the sessions court as there is no time limit to charge.

[46] The cases in *Samsudin v Public Prosecutor* [1962] MLJ 405, *Satli bin Masot* [1999] 2 SLR 637, *Yusri Pialmi v Public Prosecutor* [2010] 3 MLJ 445; [2010] 4 CLJ 828, *Public Prosecutor v Chew Chee Wah* [1995] 4 MLJ 26, *Public Prosecutor v Lim Chau Siu* [1951] MLJ 177, *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79 and *Andy bin Bagindah v Public Prosecutor* [2003] 2 MLJ 644 were all cited to support the argument of the prosecution.

[47] There was no motive to withhold the original investigating officer one

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Chief Inspector Ramachandran in this case who is not a material witness. In any event, he was offered to the defence at the end of the prosecution case.

[48] He submitted that based on the evidence adduced, there was dishonest intention on the part of the appellant in using the money entrusted to her to be used for another purpose.

SENTENCING

[49] The learned deputy prosecutor contended that the appellant had committed a serious offence and the jail term of two years meted out to the appellant is manifestly inadequate.

[50] A deterrent sentence would deter others who will be inclined to commit the same offence and public interest must be taken cognisance of by the court.

[51] He cited *Public Prosecutor v Mohamad Nor & Ors* [1985] 2 MLJ 200, *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83, *R v Sargeant* (1975) 60 Cr App R 74, *Public Prosecutor v Yap Koon Mong* [1999] 4 SLR 257, *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 and *Tan Koon Swan v Public Prosecutor* [1987] 2 MLJ 129 to support his canvassing for a heavier sentence.

[52] Hence, learned deputy prosecutor submitted that the conviction should be upheld and a heavier sentence ought to be given to the appellant.

FINDINGS OF THE HIGH COURT

[53] Although the bone of contention centres on the issue of dishonesty, nonetheless for the sake of completeness, this court has scrutinised the entire appeal record to see whether in essence at the close of the prosecution case, the prosecution had proved a prima facie case against the appellant, and on the other hand whether the appellant had raised a reasonable doubt upon the case for the prosecution at the end of the defence case.

[54] The court finds that the trial court had abided by the provision of s 180(1), (2), (3) and (4) of the Criminal Procedure Code at the close of the prosecution case.

[55] Section 180(4) lays down:

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> For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[56] In doing so, this court is aware of the relevant case-law authorities.

[57] In the Court of Appeal case in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734, it held that at the end of the case for the prosecution, the trial judge presiding alone, as a trier of fact, must subject the prosecution evidence to a maximum evaluation and posed himself the question:

> If I decide to call upon the accused to enter on his defence, and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative, then no prima facie case has been made out, and the accused is entitled to an acquittal.

[58] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 100, the Federal Court held that:

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative, then a prima facie case has been made out. This must as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt, there can be no prima facie case.

[59] In the Federal Court case in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, it was held that the trial court must undertake a maximum evaluation of the prosecution evidence when deciding whether to call for the defence of the accused. The court must at the same time assess the credibility of the witnesses for the prosecution and the drawing of inferences admitted by the prosecution evidence. If the evidence admits of two or more inferences, then draw the inference that is most favorable to the accused.

[60] If the court call for the defence of the accused and he remains silent, is the court prepared to convict him on all the evidence adduced before it; and if the answer is 'Yes,' then a prima facie case has been established and the accused should be called to enter his defence. If not, then no prima facie case has been made out and the accused ought to be acquitted and discharged.

[61] Overall, this court finds that the learned trial judge had not erred in law or facts.

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APPEAL PROPER

Definition of criminal breach of trust

[62] Section 405 of the Penal Code:

> Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so, commits 'criminal breach of trust'.

[63] In *Public Prosecutor v Yeoh Teck Chye* [1981] 2 MLJ 178, Wan Suleiman FJ interpreted s 405 of the Penal Code:

(a) The accused should be entrusted with property or dominion over property;

(b)
- (i) he should dishonestly misappropriate or convert the property to his own use; or
- (ii) dishonestly use or dispose of the property or wilfully suffer any other person to do so in violation of;

(c)
- (i) any direction of law prescribing the manner in which such trust is to be discharged; or
- (ii) of any legal contract made touching the discharge of such trust.

[64] In *Om Prakash v State of UP* [1957] Cr LJ 575, Govinda Menon J interpreted it:

(a) The accused must be entrusted with property or with dominion over property.

(b) The person so entrusted must:
- (i) dishonestly misappropriate or convert to his own use that property;
- (ii) or dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation of;
  - (a) any direction of law prescribing the mode in which such trust is to be discharged; or

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(b) any legal contract made touching the discharge of such trust.

INGREDIENTS OF THE OFFENCE

Entrustment/Dominion

[65] Per Viscount Haldane in *Lake v Simmons* [1927] AC 487:

> The first concept is the word 'entrustment' which is not necessarily a term of law. In its general significance, all it imports is a handing over of possession for some purpose which may not imply the conferring of any proprietary right.

[66] Under s 405 of the Penal Code, this is the first ingredient the prosecution must prove.

[67] In the Supreme Court case in *Public Prosecutor v Lawrence Tan Hui Seng* [1993] 4 CLJ 225, it viewed that for purposes of s 405 of the Penal Code, 'there must be actual and not just a fictional entrustment. This is because the expression 'entrustment' implies that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner'. The Supreme Court referred to the Indian case in *State of Gujerat v Jaswantlal* AIR 1968 SC 701 on the meaning of dominion:

[68] For the meaning of 'dominion' in the context of criminal breach of trust; in *Sinnathamby v Public Prosecutor* [1948–49] MLJ Supp 75, Thompson J held that s 408 of the Penal Code applies not merely in cases where the exercise of possession of dominion over property is one of the legal incidents of the contract of service but in every case where by virtue of the existence of the contract of service the accused person is in fact in a position to exercise dominion.

[69] The testimony of PW1 shows that the sum of RM270,972.16 was entrusted to the appellant and this is incontrovertible evidence because the appellant herself admitted that she had received the said sum. This is not an issue.

Property

[70] In general 'property' refers to moveable and immoveable property and it is settled law that the former includes money as recognised by a number of Malaysian court cases relating to the offence of criminal breach of trust, for example in the cited Supreme Court case in *Public Prosecutor v Lawrence Tan*

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Hui Seng, Court of Appeal case in *Gnanasegaran Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1; [1997] 4 CLJ 6 and *Dato Yap Peng v Public Prosecutor* [1993]1 MLJ 337 (HC).

[71] The testimonies of Mohd Farid bin Hamdan Mustafa ('PW6'), the Assistant Bank Manager of Bank Islam Branch in Medan MARA Kuala Lumpur in 2001 confirmed that the four cheques (exhs P9, P10, P11 and P12) all dated 24 March 2001 were cleared on 29 March 2001.

[72] Aishah bt Che Rose ('PW7') who worked as a bank officer at Bank Muamalat, Universiti Sains Malaysia in 2001 confirmed that the Bank Muamalat cheque ('exh P2') was for the amount of RM170,972.16 and she had paid this sum to Suhani & Partners.

[73] Both the evidence of these two witnesses verified that the 'property' which was the sum of RM270,972.16 was paid to the appellant.

Actus Reus

[74] Based on the evidence of PW1, the complainant of the case and PW9, the investigating officer, the appellant had misappropriated, meaning to improperly set aside the sum of RM270,972.16 to the exclusion of PW1 and the other purchasers all who could be considered as rightful owners of the said money. She had also converted, meaning to appropriate and use their money (property) without right as if the money in question was her own for her own use.

[75] Ironically the appellant herself admitted that she had spent the money but she did not view that in doing so, it was misappropriation and/or conversion into her own use. There was no dishonest intention.

Mens rea

[76] Here it means the mental element namely 'dishonesty' which the appellant had vehemently denied being dishonest when she used the said sum. Yong Pung How CJ in *Cheam Tat Peng v Public Prosecutor* [1996] 1 SLR 543 held that the pivotal consideration on whether the appellants had acted dishonestly is for the appellate court to refer to s 24 of the Penal Code. Section 24 of the Singapore Penal Code is in pari materia with s 24 of the Malaysian Penal Code.

[77] This section defines 'dishonesty':

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Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual loss or gain, is said to do that thing 'dishonestly.

[78] Section 23 of the same Code defines 'Wrongful gain' and 'wrongful loss':

'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled.

'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.

[79] A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

[80] In *Law of Crimes* by Ratanlal & Dhirajlals, (25th Ed), at p 2101: Mens Rea — The gist of offence of criminal misappropriation is 'dishonest intention. Mere retention of property is not enough. It is, however, not necessary that the prosecution must establish that there was intention on the part of the accused to retain the amount permanently. Temporary retention is also sufficient.

[81] On p 2061, it further defines 'misappropriate' means 'improperly setting apart for one's use to the exclusion of the owner'.

[82] 'Converts' *means appropriation and dealing with property of another without right as if it is his own property*.

[83] Applying the definition to the facts of this case, this court finds that the appellant had indeed committed an act of dishonesty as her explanation on why she had used up the money was not reasonable, when taking into consideration the facts and surrounding circumstances of the case.

[84] The court will delve into this aspect of the finding later on.

DISHONESTY

[85] Reverting to the cited case in *Public Prosecutor v Lawrence Tan Hui Seng*, reference of questions of law of public interest within the meaning of s 66(1) of the Courts of Judicature Act 1964 were posed to the Supreme Court.

[86] Per Edgar Joseph Jr SCJ:

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1 Whether the element of 'dishonesty for the offence of criminal breach of trust under the Penal Code is in law proved *when an advocate and solicitor takes a certain sum of money from the clients' account of the firm for the use of the firm, without authority of the client?*

[87] The answer would *depend on the particular circumstances of the case* including the *explanation* of the accused and whether or not it is *accepted*.

Whether it would make any difference if the money was taken with the intention of replacing the sum taken as soon as the firm was able to do so?

[88] *If the essential elements of the offence of criminal breach of trust have been made out, the fact that at the time of the offence, the accused had intended to make restitution as soon as possible, could not in law constitute a defence because even temporary misappropriation or conversion of money*, or dishonest use or disposal of it in violation of any direction of law or of any legal contract express or implied or wilfully suffering any other person so to do, would amount to criminal breach of trust within the meaning of s 405 of the Penal Code.

[89] In the cited case in *Gnanasegaran Pararajasingam v Public Prosecutor* the Court of Appeal held:

To use one client's money to settle a solicitor's liability to some other client is a criminal offence.

DID THE PROSECUTION PROVE THE ELEMENT OF DISHONESTY?

Analysis of the appellant's explanation

[90] The appellant tried to ward off the onslaught of the prosecution case by arguing vehemently that there was no element of dishonesty involved when she used up the amount of RM270,972.16 belonging to PW1 and his fellow purchasers because she did not misappropriate/convert the money to her own use.

Using the money to settle the conveyancing files of Messrs Ariffin & Co

In the defence of the appellant, she testified:

RM270,192.16 yang didepositkan dalam Clients'Account tepaksa saya gunakannya. Pada ketika itu saya amat memerlukan wang untuk menyelesaikan pembayaran tertunggak bagi fail-fail conveyancing untuk kesemua anak guam dari Tetuan Afiffin & Co.

Sementara itu terdapat kes guaman yang berjalan berkenaan aset dan wang dalam akaun firma guaman Ariffin & Co yang mana anak anak Hj Ariffin sendiri telah mengambil tindakan perundangan ke atas saya.

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> Saya amat percaya prosiding tersebut akan memihak pada saya kerana kesemua wang dalam akaun tersebut adalah harta perkongsian dan harta pusaka.... Atas keyakinan ini saya telah memakai wang dalam akaun pelanggan firma Suhani & Partners khususnya berjumlah RM 270,972.16 kerana saya amat yakin wang yang dibelanjakan tersebut boleh dikembalikan semula iaitu restore selepas saya memperolehi wang dari akaun Ariffin & Co. Saya telah pakai *kesemua* RM 270,972.16 tersebut.'...

[91] It is of much significance to note that the testimony in the defence of the appellant was given in court on 4 December 2009, eight years and nine months over after 25 March 2001 which was the final date in which the balance purchase price in question ought to have been paid to the vendor.

[92] During the interval between 25 March 2001 and 4 December 2009, the appellant had plenty of time to chew over her defence. This court views that her explanation is not compelling and convincing. Hence, this court does not give much probative value to her defence.

[93] The appellant is trying to justify that there was no dishonest element involved when she used up the said sum in such a situation. Nonetheless, her explanation is devoid of merit because she was *not legally entitled to the money* at all and it was entrusted to her in her capacity as a conveyancing lawyer to pay the balance purchase price totaling RM270,972.16 to the vendor in order to finalise the transaction.

[94] Neither had she asked for permission from PW1 to use the money for such a purpose on the understanding that the sum in question would be returned within a specified time frame. *The noteworthy point is that she had used up this amount of money entrusted to her for another purpose obviously in the interests of her own firm Suhani & Partners and her act was shrouded in secrecy from the knowledge of PW1. If such an act does not amount to dishonest intention, then what else can it be?*

[95] The appellant explained that she had spent the whole particular sum deposited into the clients' account of her firm to settle whatever the outstanding monetary payments due in connection with the hundreds of conveyancing files opened by Hj Ariffin before he passed away, like stamp duties, progress payments to the housing developers and penalty payments.

[96] The appellant claimed that she felt responsible for these files handled by the former legal firm of Messrs Ariffin & Co and as all its accounts were frozen by the Bar Council, she was of the opinion that it was easier for her to manage the files from the former firm under her own name Suhani & Partners.

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[97] *The court also observes that there was no evidence adduced to show that there was any element of urgency involved to deal with those files. Clients would have understood if there was some delay because the lawyer handling them had passed away*.

[98] Assuming even though the intention of the appellant was altruistic, nonetheless, it cannot detract from the very fact that the sum of RM270,972.16 was in the first place not meant for the purpose of settling those conveyancing files. It was solely entrusted to her as the balance of the purchase price to be handed over to the vendor of the land property named Hj Mohd Noor bin Said @ Mohd SA Fifilan with whom PW1 and his fellow purchasers had entered into an agreement to buy.

[99] The appellant had not acquired any legal right to the sum of money in question just by virtue of her position as a conveyancing lawyer to use that sum of the balance of purchase price to settle the conveyancing files.

[100] At the risk of repetition, the appellant was not legally entitled to use the amount of RM270,972.16 entrusted to her for her own purpose and knowing that she was not entitled to do so, and by using up the money, she had the intention of causing wrongful gain to herself and wrongful loss to PW1 and his other fellow purchasers. She had acted dishonestly.

Intention to return the money

[101] She attempted to justify that there was no dishonesty on her part in using the money in question because she was confident that she would be getting back some money from the Kuala Lumpur court case filed by the family members of the late Hj Ariffin against her relating to the assets and money of Messrs Ariffin & Co. Unfortunately the decision of that court did not favour her and she could not return the said sum.

[102] The cited Supreme Court case in *Public Prosecutor v Lawrence Tan Hui Seng* had held that it would not make any difference even if the money was taken with the intention of replacing the sum taken as soon as the firm was able to do so.

[103] It was argued that the cautioned statement ('exh D47') of the appellant shows such an intention. This court had examined p3 of D47 but could not find any specific answer from the appellant that she would repay the money.

[104] Her perception of the outcome of the Kuala Lumpur High Court is irrelevant as the appellant for reasons best known to her had shut her mind to

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the other possible consequence that the court's decision might be against her interests. She did not provide an answer on what she would do to refund the money for such an eventuality which later really did happen.

[105] This court views that retention of the sum of RM270,972.16 in such circumstances can also amount to a dishonest intention to misappropriate the money criminally because the appellant could have got the money to settle the conveyancing files from other sources like taking a bank loan or borrowing from family members or friends. By taking the easy way out in taking advantage of the said sum entrusted to her, the appellant had also acted dishonestly.

FOREIGN INVESTMENT COMMITTEE

[106] One of the contentions of the appellant is that as the vendor is a citizen in Saudi Arabia, she had to seek the approval from the foreign investment committee in the prime minister department or that such approval was later not granted.

[107] At the material time, assuming what she said about the status of the vendor is true, even if the committee were to grant approval, there was no evidence led to show that the appellant could have the sizeable amount of money at that material time to be given to the vendor or to PW1.

[108] In any event, there was no forthcoming evidence from the appellant being the lawyer handling the sales transaction who was supposed to know out all the background details of the vendor and purchasers to show that Hj Mohd Noor bin Said @ Mohd SA Filfilan is a Malaysian citizen residing in Saudi Arabia who had renounced his Malaysian citizenship or that he is not a Malaysian citizen but actually a Saudi Arabia citizen. If the said Hj Mohd Noor is a Malaysian citizen but now residing there, there is also no evidence led that he had given up his Malaysian citizenship. His birth name being 'Mohd Noor bin Said' and the fact that he was the owner of the property in Malaysia in all likelihood points to him being a Malaysian and his link to Malaysia.

[109] Thus the issue of getting approval from this committee is still questionable because there was insufficient evidence adduced by the appellant concerning his true status. This argument is baseless.

[110] The appellant in D47 also claimed that she could not complete the transfer of the property because the daughter of the vendor being dissatisfied with the delay from this committee then took back the issue of document of

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title relating to her father's property. The real reason being that she was not able to deliver the balance of the purchase price and the vendor could not wait any longer.

[111] The court does not believe this aspect of her defence in throwing the blame onto the foreign investment committee as the appellant did not adduce a shred of evidence like documentary proof of correspondence between her firm and the committee on the subject matter to bring credence to her claim. Bringing the committee into her line of defence is a red-herring.

Section 114(g) of the Evidence Act 1950

[112] In *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC), per Mohamed Azmi SCJ: 'It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under the illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or so for non production of not just any witness but an important and material witness to the case.' The evidence of the appellant herself did not in any way implicate the other partners of the firm. Both Parijal bin Jamaludin and Saharnisha Begum bt Gulam Mohideen are not material witnesses and neither are they essential to the unfolding of the narrative of the prosecution case in accordance with s 9 of the Evidence Act 1950.

Letter dated 6 July 2001

[113] The letter dated 6 July 2001 from the appellant's firm addressed to PW1 informing him that 'pihak kami akan menjelaskan wang berjumlah sebanyak RM270,972.16 sahaja secepat mungkin setelah di tolak Kos dan Perbelanjaan yang melibatkan firma guaman 'Suhani & Partners' does not reflect the true intention of the appellant to settle the particular amount of money at that material time.

[114] The court finds that the learned sessions court judge had not erred in law in admitting this letter ('exh P14') as it is relevant evidence and it was sent to PW1 from the appellant's firm herself. The authenticity and the maker of this letter were not challenged.

[115] Keeping in mind that the appellant had already been paid her legal fee of RM7,000 over, the purported 'costs and expenses' involving the firm's role in the transaction which had not even been executed fully yet would definitely not be a substantial sum. Therefore the content of this letter does not make sense and there was no reason to hold back the said sum.

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[116] *The court finds that in reality this letter was merely to pacify the irate PW1 and his fellow purchasers and stalling for time because the balance purchase price of RM270,972.16 to be paid to the vendor was then overdue*. The sales and purchase agreement was entered on 27 July 2000 and a deposit sum of RM30,108.02 being 10% of the total price of the land had already been paid to the vendor. Obviously the vendor must have been clamouring for the balance of the purchase price from PW1.

[117] The letter was dated 6 July 2001. As the balance of the purchase price must be settled within six months from the agreement date (completion date 25 January 2001) and considering that a further two month grace period after the expiry of the six month deadline was also given, this means that three months over had already elapsed and the balance purchase price was still not been paid to the vendor.

[118] The frustration, anguish and anger of PW1 on knowing that the sum of RM270,972.16 had still not been handed by the appellant over to the vendor finally goaded PW1 to make a police report on 7 July 2001 against the appellant.

[119] Despite Bukit Mertajam Police Report No 3899/01, the appellant still did not settle the said sum. Obviously PW1 was perturbed by the indifference from the appellant in regard to the matter that he next complained to the Director of Complainant Secretariat of Advocates and Solicitors about her on 6 December 2001.

[120] In spite of this complaint, the appellant still did not reach out to PW1 to try to resolve the matter and if she had done nothing wrong, there was no reason for her not to discuss it openly with him. The court can only infer that due to her steadfast reluctance and avoidance of meeting PW1, her spending of the money smacks of dishonesty.

Penang High Court order

[121] By an order of the High Court of Penang dated 28 March 2002 arising out of a civil suit filed by PW1 against the appellant in this matter, the latter was ordered to pay back the amount of RM270,972.16 to the former. Despite the order issued by the court, the appellant did not comply with it.

[122] If the appellant viewed that she had not criminally misappropriated the said money, why did she evade meeting up with PW1 to find a solution to the matter?

Suhani & Partners' firm closed down

[123] Eventually the legal firm of Suhani & Partners was subsequently

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dissolved on 12 March 2003 and the appellant was struck off the roll of advocates and solicitors on 4 May 2005. Again despite the shutting down of her firm, the appellant did not attempt at all to settle with PW1 in regard to the sum of RM270,972.16 and also did not contact him.

Discussion

[124] In early 2008, in all probability when things were getting too hot, the appellant discussed with PW1 and his fellow purchasers on a settlement concerning the repayment of the money owed to them.

[125] If the appellant had honorable intention in using up the sum of RM270,972.16 for her own use as she claimed without any element of dishonesty, then why waited only until early 2008 to engage in discussion after a period of almost seven years had already passed since the final date for the completion of the agreement was due in March 2001.

Police case

[126] Eventually the unresolved matter resulted in the arrest of the appellant by the police on 13 March 2008 and the first directive ordered by the police authority to charge the appellant was issued on 18 March 2008. She was then supposed to be charged in court on 22 March 2008 but it did not take place as the appellant herself had made a representation to the attorney general's chambers.

[127] The police report made a profound change in the appellant's attitude towards the whole matter and she began to view it seriously, leading eventually to the refund of the sum of RM270,972.16.

[128] If the appellant really had all along harboured the intention to return the money after purportedly spending it to settle the conveyancing files, why did not she do it way back in 2001 or 2002.

[129] After the appellant was arrested by the police on 13 March in 2008, then she only started to pay back the first installment of RM20,000 on 30 March 2008 until the last installment was finally paid on 17 November 2008 amounting to RM280,000.

Admissibility of exh P13 — s 51A(1)(b) of the Criminal Procedure Code

[130] Casting aside the issue on the admissibility of P13, there is sufficient

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and compelling evidence to show that the appellant had received the said sum as stakeholder in her capacity as the conveyancing lawyer in charge of the relevant case.

[131] It is the humble view of this court that s 51A of the said Code is merely directory and not mandatory and the learned trial judge had not erred in rejecting the objection from the defence when the prosecution applied to tender P13 as an exhibit.

[132] In any event, the appellant herself being the maker of P13, was in no way being prejudiced or thrown off balance by the tendering of it.

Recalling of PW1

[133] This court finds that the learned defence counsel during the trial had ample opportunity to cross-examine the complainant (PW1) on all the material points of the case and hence the refusal of the learned trial judge to disallow the application to recall PW1 under s 425 of the Criminal Procedure Code is not an issue.

[134] The court is aware of the Supreme Court case in *Ramli bin Kechik v Public Prosecutor* [1986] 2 MLJ 33 which held that the discretion given by s 425 depends on the facts of each case — the main consideration being the essentiality of the additional evidence to a just decision of the case.

[135] If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction, the court would be justified in exercising its discretion to call for the additional evidence.

[136] In this instant case, the overall evidence is overwhelming and cogent against the appellant on record even without any additional evidence. Please see *Phon Nam v Public Prosecutor* [1991] 2 MLJ 550(SC).

Dishonesty — Overall findings

[137] The overall findings on dishonesty will inevitably overlap with the same subject matter already thrashed out above and this is unavoidable.

[138] The court finds that the prosecution had proved its case beyond reasonable doubt against the appellant in that she had dishonestly misappropriated and/or converted the sum of RM270,972.16 to her own use. The ingredients of the offence had been proven and thus the presumption under s 409B of the Penal Code applied.

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[139] The case of *Hj Maamor Hj Abdul Manap v Public Prosecutor* [2002] 6 MLJ 668; [2003] 1 CLJ 370 relied on by the appellant can be distinguished as in that case the money involved was given as loans to the accused.

[140] To quote from The 'Law of Crimes' by Ratanlal & Dhirajlal's (25th Ed) on p 2041:

> To constitute the offence of criminal breach of trust, there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged. There must be an entrustment; there must be misappropriation or conversion to one's own use or use in violation of any legal direction or of any legal contract; and thirdly the misappropriation or conversion or disposal must be with a dishonest intention.

[141] In *Sathiadas v Public Prosecutor* [1970] 2 MLJ 243, per Raja Azlan Shah J (as His Royal Highness then was) when hearing the appeal held:

> It must be stated here that for the purpose of establishing dishonest intention, the prosecution is not required to eliminate all possible defences and circumstances which might exonerate the appellant, or that apart from proving the appellant's possession of the money and his inability to account for it, it has also to prove the exact manner of his disposal of the money in a manner contrary to the purpose for which he received it.

[142] In *Wickrasooriya v Public Prosecutor* [1964] 30 MLJ 281, Ismail Khan J concurred with Fazl Ali J in the Indian case in *Harakrishna Mahatab v Emperor* AIR 1930 Patna 209 which held:

> It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest.

Wilful omission to account

[143] The length of time that the appellant had wilfully omitted to account to PW1 on the money in question as well as evading him even though a police report was lodged by PW1 against her on 7 July 2001 regarding it and PW 1 had also complained about her to the Director of the Complainant Secretariat of Advocates & Solicitors Disciplinary Board on 6 December 2001 told against her in her defence.

[144] What is more, although an order of the Penang High Court dated 28 March 2002 had directed the appellant to pay back the sum of money in

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question to PW1, yet the appellant kept mum about the court order and did not even attempt to meet up with PW1 to find a solution to her financial predicament.

[145] In *Law of Crimes* by Ratanlal & Dhirajlal on p 2063 it states:

> If a person receives money which he is bound to account for and does not do so, he commits this offence, although no precise time can be fixed at which it was his duty to pay over the money.

[146] In the present case what is worse in that there was a precise time in which the appellant was obliged to hand over the balance purchase price.

[147] On p 2064 it further elaborates:

> It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused because under the law even temporary retention is an offence provided that it is dishonest. The essential thing to be proved in such cases is whether the accused was actuated by dishonest intention or not.

[148] The appellant was the acting conveyancing lawyer for PW1 and the other purchasers in the land transaction and she was obliged to account for what she had done with their money entrusted to her yet she wilfully failed to do so.

[149] The only inference for the court to draw is that the appellant was actuated by dishonest intention when she spent the amount of RM270,972.16 and in all probability she was left with a sense of guilt and avoided meeting PW1 or the other purchasers until eventually when the police arrested her on 13 March 2008.

[150] Assuming for a while that the appellant then did not have the means to repay the money, nonetheless she could still have met up with PW1 to try to work out a solution to enable her to repay the money in stages. Why did not she embark on such a plan?

NO OVERTURES

[151] Since the letter dated 6 July 2001 from Suhani & Partners telling PW1 that the firm would settle the sum of RM270,972.16 *as soon as possible* after deducting 'the costs and expenses' spent by the firm in the matter, *no follow up overtures were ever made to PW1 over a long time span*.

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[152] Discussions to solve the matter only started in early 2008 almost seven years later after the letter was sent out. Again it must be repeated that the appellant was sensing that the police was then closed to arresting and charging her in court which actually occurred on 13 March 2008 that she eventually responded positively.

[153] This court wonders what if the police had not arrested and charged her with the offence at all, would the appellant still come forth to pay up the money.

[154] For the aforesaid reasons, the court upheld the conviction imposed by the sessions court.

THE APPELLANT

Mitigation

[155] The mitigation centres on the repayment of the whole sum of RM270,972.16 being given back to PW1 and his fellow purchasers. It was pointed out that in reality the sum of about RM280,000 which was more than the sum that was owed was actually restored.

[156] There was no dishonest intention on the part of the appellant.

[157] The appellant is now a full-time homemaker with one biological child and eight step children to take care. She is no more practising as an advocate and solicitor. The sentence meted out by the sessions court is adequate.

Prosecution

[158] Learned deputy public prosecutor asked for a deterrent sentence because the two year imprisonment imposed by the sessions court was manifestly inadequate. He drew the attention of the court to the seriousness of the offence committed by the appellant, then a lawyer.

[159] He urged the court to consider public interest and cited *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200 (SC); *Public Prosecutor v Loh Choon Fatt* [1976] 2 MLJ 256; *Public Prosecutor v Khairuddin* [1982] 1 MLJ 331; *R v Sargeant* (1974) 60 Cr App R 74;; *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; *Public Prosecutor v Yap Koon Mong* [1999] 4 SLR 257 (CA); *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 (SC) and *Tan Koon Swan v Public Prosecutor* [1987] 2 MLJ 129

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(CCA) (S'pore) to support his asking for a deterrent sentence.

THE COURT

[160] Although the appellant had made restitution, nevertheless based on the agreement, in all likelihood, the deposit sum amounting to RM30,108.20 had been forfeited due to the non completion of the contract.

[161] The court enhanced the custodial sentence from two years to six years on the appellant due to the aggravating factors in this case. In *Sarjit Singh s/o Mehar Singh v Public Prosecutor* [2002] 4 SLR 762 (High Court) (Singapore), where the petitioner was an advocate and solicitor, Yong Pung How CJ held:

> Cases under s 409 of the Penal Code are more serious than simple criminal breach of trust cases since under the situation envisioned by the provision, the offender was ex hypothesi standing in a fiduciary type relationship with the victim of the offence.

[162] In *Wong Kai Chuen Philip v Public Prosecutor* [1990] 1 SLR 1011, Chan Sek Keong J (as he then was) highlighted:

> Criminal breach of trust by a lawyer in the discharge of his professional duty must inevitably call for a custodial sentence of a deterrent nature, not so much as to deter the offender concerned but to deter other members of his profession from committing similar offences.

[163] The appellant had betrayed the trust placed in her as an advocate and solicitor. For almost seven years or more she had not even sought to make amends with PW1 for dishonestly misappropriated and/or converted the amount of money in question to her own use until she was about to be arrested by the police and charged in court.

[164] The sum of RM270,972.16 was a large amount in 2001 and she had wrongly deprived PW1 and all the other purchasers of the opportunity to own the plots of land that they had wanted not forgetting that they all had borrowed the money from the cooperative society. Without being degrading, all of them hail from the working class like the majority of the employees in the work force in the market, and being unable to get the property that they had wished to own probably had caused them a lot of frustration and pain. A person of substantial means would not be much affected by such a single transaction.

[165] Therefore the court is of the view that the increased custodial sentence imposed not only fulfils public interest but it also acts as deterrence to others in the same profession who may be inclined to commit such offence.

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[166] The few black sheeps like the appellant had created an unfavourable public image of the legal profession.

Appeal dismissed.

Reported by Kanesh Sundrum